

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re Application of: Michael J. Shebek)	
)	
Application No. 10/735,144)	Group Art Unit: 3751
)	
Filed: December 12, 2003)	
)	
Title: UNIVERSAL TRACK AND)	
COPING ASSEMBLY FOR)	
POOL COVERS)	Examiner: Robert M. Fetsuga

APPELLANT'S REPLY TO EXAMINER'S ANSWER

Mail Stop Appeal Brief - Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

This brief is submitted in reply to the Examiner's Answer, dated February 20, 2007.

ARGUMENT

In response to the Examiner's arguments at p. 4 of Examiner's Answer, as an initial matter, Appellant must respectfully disagree with the Examiner's characterization of Appellant's Appeal Brief. The Examiner states at page 4 of Examiner's Answer that "Appellant argues at page 10 of the brief claims 1 and 12 each require channel openings of different configurations." However, Appellant made no such contention in Appellant's Amended Appeal Brief; rather, Appellant merely stated that, based on the totality of the disclosure of the application, claims 1 and 12 are broad enough to cover both identically-configured and differently-configured channels when properly interpreted. *See, e.g.*, Appellant's Amended Appeal Brief, p. 11. It is thus immaterial that the terms "different" or "differing" are absent from these claims, and the

Examiner's argument¹ that these terms should be present in claims 1 and 12 does not address the breadth of these claims, which cover a concept broader than either identically-configured channels or differently-configured channels standing alone. The case law that supports Appellant's interpretation of these claims has been cited and discussed at length in Appellant's Amended Appeal Brief, and Appellant rests on its appeal brief without repeating such arguments here.

In response to arguments raised on pages 3 and 5 of Examiner's Answer, Appellant also disagrees with the Examiner with respect to his arguments regarding the scope of the Last Reference. The Examiner argues that "the contested functional language is so broad as to literally encompass a reversible track having identical channel opening structures, like those illustrated in Last." Examiner's Answer, p. 5. The Examiner goes on to state: "the pool cover edge and cabling [in the Last Reference] are certainly different 'configurations' even though the channel openings 17, 21 may be substantially identically structured." *Id.* While Appellant disputes the Examiner's understanding of the language of claims 1 and 12 on this point (specifically "said first opening defining a first configuration" and "said second opening defining a second configuration," especially in light of the Examiner's statement at p. 5 of Examiner's Answer that "the channel openings 17, 21 [in the Last Reference] may be substantially identically structured"), the fact remains that Appellant has submitted the evidence of Bruce Holmes, one of ordinary skill in the relevant art, in support of its understanding of the scope of the Last Reference and the claims at issue, and the Examiner has not rebutted this evidence.

In response to the Examiner's arguments appearing at pages 4-5 of Examiner's Answer, it is clear to Appellant that the Examiner has presented no evidence in support of his position —

¹ See Examiner's Answer, p. 4.

only arguments. Appellant, on the other hand, has presented both legal arguments and un rebutted evidence that one of ordinary skill in the art would not understand the Last Reference to disclose differently-configured channels. *See* Declaration of Bruce Holmes ("Holmes Declaration"), recognized by the Examiner in the Office Action dated February 14, 2006. Significantly, however, the Examiner has not undercut the position of the declarant in the Holmes Declaration, nor has he challenged Mr. Holmes's qualifications as one of ordinary skill in the art. The Examiner's position, in effect, is that he disagrees with the declarant's conclusion. While this is to be expected, the Examiner is not one of ordinary skill in the art, nor has he introduced any evidence regarding the understanding of one of ordinary skill in the art. The Holmes Declaration stands as un rebutted evidence that the Examiner's opinion is incorrect.

CONCLUSION: The Examiner's Rejection of Claims 1-17 Cannot Stand

In view of the foregoing, Appellant respectfully submits that the Examiner has failed to maintain proper rejections of claims 1-17. Therefore, each of Appellant's claims that previously were rejected should be allowed. Appellant further submits that the application, in its present form, is in condition for allowance. Such favorable action, after reexamination and reconsideration, is respectfully requested. In the event any extension of time or payment of fee is required, Appellant hereby conditionally petitions therefor and authorizes any charges to be made to Deposit Account 02-0390, BAKER & DANIELS.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'K.R. Erdman', with a stylized flourish at the end.

Kevin R. Erdman
Registration No. 33,687
Attorney for Appellant